Supreme Court, U.S.
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No. 97-1732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

California Public Employees' Retirement System and Florida State Board of Administration,

Petitioners,

v.

Paul Felzen, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Neither of the questions presented in the petition for writ of certiorari is an accurate or fair statement of any issue involved in this case. The proper statement of the issues presented is:

1. Whether a nonparty shareholder, who objects to the settlement of a derivative action, but does not move to intervene in the district court, must be allowed to appeal the district court's approval of the settlement.

2. Whether a nonparty who ignores a prior decision of the court of appeals holding that only parties or those who seek to intervene have a right to appeal from a district court's orders is entitled to relief from that rule simply because the court of appeals' prior decision arose out of a different factual situation.

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STATEMENT OF THE CASE

Respondents Paul Felzen and Sandra Esner are Archer Daniels Midland Company ("ADM") shareholders who brought this derivative action in July 1995 on behalf of ADM and its shareholders against 17 ADM directors who had been board members during a period in which ADM had engaged in illegal price-fixing. In May 1997, after two years of discovery and extensive negotiations,[1] the parties agreed to settle the case on the basis of defendants' commitments, designed to strengthen the independence of ADM's Board of Directors and prevent illegal conduct by the Company in the future, to restructure ADM's Board of Directors, to revise the structure and responsibilities of key Committees of ADM's Board and to pay $8 million, part of which ADM would use to fund an independent oversight committee for legal compliance.[2] On July 7, 1997, the

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[1] During the two years this litigation was pending, counsel for respondents reviewed all the documents ADM produced for various civil litigations, briefed successive motions to dismiss and consulted with corporate governance experts and ADM's largest institutional investors, including petitioner CalPERS, all to the end of developing measures for ADM's Board to adopt to improve corporate governance and to assure independence of the Board as part of a settlement of the litigation. On May 30, 1997, the district court entered an order preliminarily approving the proposed settlement and directing that notice be mailed to ADM's shareholders of the proposed settlement and hearing to consider whether the proposed settlement was fair, reasonable and adequate. The notice was mailed to more than 243,000 ADM shareholders.

[2] The $8 million payment is to come from the defendants' Directors and Officers liability insurance—a $10 million policy containing exclusions that put in issue whether there would be any coverage for this action.

district court held a hearing to consider the proposed settlement and the fee petition submitted by respondents' counsel relating to the services they had performed in the case and the benefits conferred on the corporation.

Petitioners, two ADM shareholders who represent less than one percent of the Company's shareholders, first appeared in the case at the July 1997 hearing. Although petitioners did not seek to intervene in this case, they participated fully in the hearing, objecting to both the settlement and the fee request filed by respondents' counsel. After a four-hour hearing, the district court rejected the objections, approved the settlement as fair, reasonable and adequate and, with some modifications to the fee requested by respondents' counsel in their fee petition, awarded counsel fees.

At no time before, during or after the July hearing did petitioners seek to become parties to the proceedings before the district court. Instead, one week after the district court rejected their position, petitioners filed a notice of appeal to the Court of Appeals for the Seventh Circuit as nonparties. Petitioners adopted this course of action notwithstanding the fact that six weeks previously, on May 30, 1997, the Seventh Circuit issued its opinion in *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997), squarely holding that nonparties who have not sought to become parties by moving to intervene may not appeal from district court orders. The *Brand Name Drugs* case was a class action, but the court of appeals' decision in that case was not limited to class actions. Instead, the court based its decision principally upon this Court's decision

in *Marino v. Ortiz*, 484 U.S. 301 (1988)—an employment discrimination case that was not a class action.

The Seventh Circuit acknowledged that its decision in *Brand Name Drugs* was somewhat at variance with some of its previous decisions. It held, however, that "[a]lthough some cases have allowed nonparties to appeal without first intervening in the district court, this bypass is no longer permissible after *Marino*." 115 F.3d at 457. Moreover, the *Brand Name Drugs* court pointed out that the Seventh Circuit had already abandoned the practice of condoning appeals by nonparties several years earlier in its decision in *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992).

In *Brand Name Drugs*, the Seventh Circuit clearly delineated the procedure that nonparty objectors who wish to appeal from a district court order must follow. An objector must move to intervene in the district court. If the district court grants the motion, the objector can, of course, appeal. If the district court denies the motion to intervene, the objector may appeal from the denial. *Brand Name Drugs*, 115 F.3d at 458. The rule in the Seventh Circuit—in effect since that court's 1992 decision in *VMS*, 976 F.2d 362, and plain beyond any doubt since the *Brand Name Drugs* holding—has been and remains that a nonparty who wishes to appeal from a district court order must seek to become a party by moving to intervene.[3]

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[3] The *Brand Name Drugs* case involved separate appeals by class members who had opted out of the class and sought to appeal from the district court's order granting summary judg-

(continued...)

When petitioners filed their objections to the settlement and fee petition in this case, the *Brand Name Drugs* decision was the most recent—and most authoritative—statement of the procedures that nonparties seeking to appeal in the Seventh Circuit from an order of a district court would have to follow. When petitioners attempted to proceed without following the procedures laid out in that opinion, respondents moved to dismiss their appeal. The court of appeals granted respondents' motion, holding that shareholders in derivative suits, like other nonparties, were required to follow the procedures set out in *Marino* and *Brand Name Drugs*.

In their petition for writ of certiorari, petitioners totally misrepresent the status of the law of the Seventh Circuit at the time they decided to appeal as nonparties without seeking to intervene. They do not even mention the *Brand Name Drugs* decision. Nor do they mention the Seventh Circuit's holding that its previous decisions permitting nonparty appeals "can no longer be considered authoritative, in light of *VMS*." 115 F.3d at 458.

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[3] (...continued)
ment in favor of the wholesaler defendants and nonparty class members who had appeared at the fairness hearing to object to the settlement but who had not intervened. Although the *Brand Name Drugs* decision does not on its face distinguish between the two orders appealed from, the appeal numbers which the Seventh Circuit's ruling dismissed include three appeals by class members from the July 1, 1996 final order of the district court approving the settlement (Nos. 96-2813, 96-2878, 96-2904). The court below failed to make this distinction, but it made no difference because it recognized that the distinction is "inconsequential." Appendix to the Petition for a Writ of Certiorari, hereinafter "___a", at 4.

On the basis of their misrepresentation as to the status of the law, petitioners seek to portray themselves as victims of a change in the law that they did not and could not anticipate. And they ask this Court to assist them by granting them the right to appeal as nonparties despite their failure, or refusal, to comply with the clear procedural requirements applicable to all cases in the Seventh Circuit. There is no reason for this Court to exercise its discretionary jurisdiction to protect petitioners from the consequences of decisions for which they alone are, and should be, responsible.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because It Presents An Inaccurate Statement Of The Decision Below And Asks This Court To Review Issues Not Presented In This Case.

The Petition mischaracterizes the decision of the court below by representing that it requires that a nonparty be formally made a party to the litigation as a prerequisite to the right to appeal.

That is an erroneous characterization of the decision of the court below, which simply applied to petitioners this Court's decision in *Marino* and its own holding in *Brand Name Drugs* requiring that nonparties move to intervene:

> Only parties may appeal. So too with shareholders, who have no more right to speak for the firm or control its litigation decisions than bondholders or banks or landlords, all of whom have contractual interests that may be affected by

> litigation. It may be, as appellants stress, that some district judges would not be receptive to attempts to intervene for the purpose of appeal, but the Supreme Court spoke to this in *Marino* when observing that a denial of a motion to intervene is itself appealable. 3a.

Thus, the issue in this case is not, as petitioners argue, whether objectors need to be formally made parties, but rather, whether objectors who wish to preserve the right to appeal must move to intervene. If objectors move to intervene and their motion is denied, they may appeal that denial and argue to the court of appeals why they should be allowed to intervene, that is, why their interests are not adequately represented by the existing parties. To the extent some district courts have discretion in ruling on motions to intervene, their discretion is still subject to review. Petitioners, therefore, are wrong in arguing that the ability to appeal "turns on a purely discretionary decision by the trial court." (Petition at 13.) The ability to appeal turns on the simple procedure of moving to intervene.

The Petition also seeks review by claiming that the decision of the court below was applied retroactively. The issue petitioners pose is premised solely on a statement of the status of Seventh Circuit law at the time the district court issued its orders in this case that completely ignores the recent holding in *In re Brand Name Prescription Drugs*, 115 F.3d 456. In *Brand Name Drugs*, the court of appeals removed any doubt that the Seventh Circuit would follow this Court's opinion in *Marino* requiring that nonparties who wish to preserve the right to appeal must first seek to intervene. In *Brand Name Drugs*, the Seventh Circuit also plainly

stated that "any contrary implication" of pre-*Marino* decisions, such as *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), "can no longer be considered authoritative." *Id.* at 458. In the face of this plain statement of the law, petitioners sought to excuse their failure to make a motion to intervene by claiming that they relied on *Research Corp. v. Asgrow Seed Co.* 7a.[4] If petitioners relied on a decision that was "no longer authoritative" they have only themselves to blame. They certainly have no basis to argue that, in dismissing the appeal, the court below applied a new jurisdictional rule to them when the court of appeals simply applied pre-existing Seventh Circuit law.

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[4] Petitioners also claim to have relied on a 22-year-old footnote in *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976). However, in the docketing statement they filed with the Seventh Circuit in July 1997 they did not cite *Tryforos*. In any event, as the court below pointed out, the *Tryforos* footnote was not reliable authority—it did not analyze the question of whether nonparty shareholders to a Rule 23.1 action may appeal—and was not settled precedent in light of the intervening decision of this Court in *Marino v. Ortiz*:

> Footnote 22 in *Tryforos* cites one case from the 1940s that permits such appeals, but that opinion did not give reasons. (*Tryforos* also cites one district court opinion from the 1960s, an odd reference for a rule of appellate jurisdiction.) An unexplained practice does not offer shelter from a later opinion of the Supreme Court holding that only parties may appeal, and withdrawing from the appellate courts any exception-making power. 3a.

Although noting that petitioners "tell us" they relied on *Asgrow Seed* and *Tryforos* (7a), the court below did not, as petitioners represent, "acknowledge" that, in failing to seek to intervene, petitioners had followed all proper procedures under settled Seventh Circuit law at the time they appealed. (Petition at 9.)

II. The Petition Should Be Denied Because The Decision Below Does Not Create A Conflict With Any Circuit Over A Matter Of Sufficient Importance To Require This Court's Resolution.

Petitioners seek review of the Seventh Circuit's requirement that a nonparty file a petition for leave to intervene as a condition to the right to appeal, principally on the ground that the Third Circuit follows a different rule. *See Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993). These decisions do not remotely justify this Court's review of this case.[5]

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[5] All other circuits that have squarely addressed the issue since *Marino* have held that nonparties in class actions must seek to intervene if they want to appeal from an order approving a settlement. *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1993); *Sanyo Manufacturing Corp. v. International Union Electronic*, 69 F.3d 541 (8th Cir. 1995); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Shults v. Champion*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993). As the citations indicate, this Court previously denied certiorari in one case, *Croyden Associates v. Alleco, Inc.*, *supra*, in which the court of appeals reached the same conclusion as the Seventh Circuit in this case. No circuit, other than the Third, has held that nonparties in derivative actions may appeal orders approving settlements without seeking to intervene. The Tenth Circuit did not, as petitioners state, "adopt" *Bell Atlantic*. (Petition at 13.) To the contrary, in *Gottlieb v. Wiles*, *supra*, the court held that unnamed class members who had not intervened could not appeal. In *dicta*, the court noted that *Bell Atlantic* was inapposite to a class action settlement because it involved a derivative settlement. Other cases that petitioners cite as having held that nonparties need not seek to intervene in these circumstances do not squarely address the issue or pre-date *Marino*. In *Rosenbaum v. MacAllister*, 64

(continued...)

In the first place, even if the different procedure adopted by the Third Circuit were viewed as creating the kind of conflict among the circuits that might merit resolution by this Court, review of this case is not warranted. The decision in this case is plainly correct and is supported by a well-reasoned opinion. Indeed, as this Court held in *Marino*, the rule requiring a petition to intervene as a condition to any appeal is fully justified by the language of Rule 3(c) of the Federal Rules of Appellate Procedure. Review here would only further delay full implementation of the structural changes in ADM's Board of Directors and legal compliance that the settlement was designed to effectuate.[6]

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[5] (...continued)
F.3d 1439, 1442 (10th Cir. 1995), the court concluded that intervention was not required because the appeal sought review of the award of attorneys' fees and expenses, not the settlement between the parties. In *PaineWebber Inc. Ltd. Partnerships Litig.*, 94 F.3d 49 (2d Cir. 1996), the court dismissed an interlocutory appeal from the district court's order denying a motion to intervene on the grounds that the motion was solely in aid of a motion that was both interlocutory and outside the collateral order exception.

[6] Respondents' expert Professor John C. Coffee of Columbia University School of Law described the corporate governance measures ADM had agreed to implement as "state of the art" and the new legal compliance provisions as being "of special value" to ADM. Respondents' financial expert R. Alan Miller of Philadelphia Investment Banking Company opined that ADM shareholders stand to gain $158 million or more from implementation of the settlement. Although petitioners now complain that the settlement did not involve a greater cash payment, during the settlement negotiations, they, and other institutional investors, emphasized that they sought corporate governance reforms, not a monetary recovery, for ADM's shareholders.

Secondly, and perhaps more fundamentally, the suggestion that a conflict requiring the attention of this Court arises every time that there is a difference among the circuits in what is essentially a procedure is clearly unsound. Petitioners have not offered any valid reason why it is essential or urgent that this Court resolve the difference. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (Court will not grant writ of certiorari except in cases where the conflict "is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.") As with other procedural rules that ultimately affect a court's jurisdiction (these may be as basic as due dates and filing fees), parties or those who wish to be parties are on notice—or have a responsibility to know—of appellate court rules, and can adjust their conduct accordingly.

Petitioners argue that some courts have allowed nonparties to appeal in other circumstances and criticize the court below for its "single-minded reliance on *Marino*." (Petition at 19.) This argument ignores that *Marino* is the applicable law and that the court below explained at great length the reasons for adhering to *Marino* and Fed. R. App. P. 3(c) in this case. It also begs the issue because petitioners provide no sound reason for carving out an exception to *Marino* and Rule 3(c) for nonparties in derivative actions. The intervention requirement does not eliminate any procedural right. It does not undermine the purposes of Fed. R. Civ. P. 23.1.

The fact that Rule 23.1 requires that every shareholder receive a court-approved notice of a dismissal or proposed settlement of a derivative action does not remotely suggest that they have an automatic right to

appeal. To the contrary, Rule 23.1 recognizes that shareholders should be afforded the opportunity to make their case to the district court, which is entrusted with the task of approving a settlement.[7] The Seventh Circuit's procedure in no way reduces a shareholder's ability to participate in the settlement approval process under Rule 23.1 or increases the burden on shareholders who wish to do so. These shareholders still have the option to object without seeking to intervene. They simply may not appeal if they fail to move to intervene. Other than their disagreement with the result the district court reached in this case, petitioners do not suggest, nor could they, that they were not afforded a full and fair hearing in the district court.

Petitioners' suggestion that parties will choose to sue in circuits that require an objector to intervene to achieve a collusive settlement is nonsensical and insulting to the federal judiciary. This assumes that a district court judge will rubber-stamp a "collusive settlement" in the face of cogent, well-founded objections and deny a well-founded motion to intervene by an objector who wishes to appeal and further that a court of appeals will not carefully review the district court's denial. If this is truly the situation, then it would make no difference if a nonparty could appeal without seeking to intervene. In either case, its appeal would be futile.[8]

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[7] The cases petitioners cite make this clear. *See, e.g., Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984); *Papilsky v. Berndt*, 466 F.2d 251 (2d Cir.), *cert. denied*, 409 U.S. 1977 (1972), and cases cited, Petition at 14-15 n. 18.

[8] Petitioners suggest that a court of appeals will not review a district court's denial of a motion to intervene, citing *In re*

(continued...)

As the Seventh Circuit explained in *Brand Name Drugs*, 115 F.3d at 457-58, there are sound reasons for a court of appeals to require nonparties to intervene:

> [A]s for the class members . . . who want to appeal even though they are not named plaintiffs, to allow them to appeal would be an even worse affront to intelligent judicial administration because it would fragment the control of the class action. . . . If class members can file their own appeals, the coherence of the class is destroyed, the scope of the class action becomes unclear, and the control over the action becomes divided and confused. So they may not appeal. *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992).

The court below recognized that these reasons apply as well to shareholder derivative actions, and that neither *Marino* nor Rule 3(c) provides any basis for distinguishing between Rule 23 and 23.1 nonparties. 4a. Indeed, the court below reasoned that there are stronger reasons for requiring shareholders to become parties if they want to appeal an order because, in a derivative action,

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[8] (...continued)
General Tire & Rubber Co. Sec. Litig., 726 F.2d 1075, 1087 (6th Cir.), *cert. denied*, 469 U.S. 858 (1984). Petition at 14 n. 13. In that case, the court affirmed the district court's denial of the objectors' motion to intervene because they sought solely to oppose the district court's approval of a derivative settlement and the court of appeals affirmed the approval of the settlement over the objectors' arguments. There is certainly nothing untoward in the court's conclusion that the objecting shareholders' interests, that is the interests of the corporation and all the shareholders, were "adequately protected" by a fair, reasonable and adequate settlement.

an individual investor is not an injured party and has no individual right to sue:

> A derivative suit is brought by an investor in the corporation's (not the investor's) right to recover for injury to the corporation. . . . Stockholders may *replace* the board if dissatisfied with its performance, but they may not *displace* the board in litigation. So it cannot be surprising that stockholders other than the named plaintiffs are not treated as parties in derivative litigation—their citizenship is ignored when determining diversity, see *Smith v. Sperling*, 354 U.S. 91, 77 S.Ct. 1112, 1 L.E.2d 1205 (1957), and they are not allowed to opt out. Corporate management may affect the interests of stockholders without notifying them or obtaining their consent; by investing in stock, they placed their funds at the management's disposal and obtained, in exchange, the right to choose future managers. Shareholders have no more the attributes of parties when managers settle derivative litigation than when managers settle antitrust litigation.

5a. (Emphasis in original)

The decision of the court below necessarily follows from the fact that a shareholder in a derivative suit is pursuing corporate, not individual, rights. If a shareholder wants to proceed on behalf of the corporation in court, it must become a party and must adequately and fairly represent the interests of all shareholders in enforcing the corporation's rights. If a shareholder seeks only to appeal from a district court order, as in the case of an objector, it must at least seek to intervene.

Intervention is not a complex procedure or one that unduly burdens a shareholder who wishes to appeal

from a district court's order approving a settlement or dismissing a case.[9] Certainly in this case the filing of a motion to intervene presented no obstacle to petitioners, whose lawyers traveled to Illinois to participate in a lengthy hearing. On the other hand, if an objector is unwilling to intervene to become a party with some stake in the litigation and some responsibility to the corporation—even if only as a party objector—it is unfair to allow this individual shareholder to "hold up" the corporation and its remaining shareholders.

Petitioners' overblown rhetoric that requiring a shareholder to seek to intervene has serious implications rests on faulty premises. It falsely assumes that intervention imposes any real burden and interferes with any existing rights of a shareholder. It does not. Shareholders have no right to sue individually on claims of injury to the corporation. They may be allowed to do so on behalf of a corporation only if the corporation's managers agree or the court permits them to bring a derivative action. Requiring them to move to intervene is consistent with that scheme.

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[9] Petitioners argue that objectors who intervene to appeal the approval of a settlement face discovery (Petition at 16), but the court below never suggested that an objector had to become the representative party in the litigation. To the contrary, *Marino* and the court below make clear that the objector may, if it wants, intervene solely for the limited purpose of appeal. 3a, 6a.

III. There Is No Issue Of Retroactivity In This Case That Justifies Review By This Court.

The decision of the court below discusses at length the issue of whether a new appellate ruling involving the jurisdiction of the appellate court should be applied retroactively. As already noted, this entire discussion is gratuitous in this case because the rule applied here had already been announced by the Seventh Circuit in *VMS* and had been forcefully reiterated and again applied six weeks prior to the filing of the notice of appeal in this case in *Brand Name Drugs*. Petitioners nonetheless attempt to justify issuance of a writ of certiorari on this additional ground, arguing that the discussion of the court below creates a conflict among the circuits and that the decision to apply the ruling here retroactively "wrongly insulates from appellate scrutiny a plainly collusive settlement in one of the most significant shareholder derivative suits." (Petition at 23.)

This entire argument is beside the point because this case involves no new jurisdictional requirement. The conflict among the circuits to which the court below refers exists in this case only at the level of dictum because it pertains to a situation inapplicable to this case. And the suggestion of a collusive settlement is a fabrication—raised in and flatly rejected by the district court—for which there is not the slightest basis in the record.[10]

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[10] Indeed, petitioners' counsel admitted at the July 7, 1997 hearing in the district court that he had no evidence of any collusion (Transcript of Proceedings ("Tr.") at 62) and the district court made an express finding that there was no basis for any claim of collusion: "I find no basis for claims of collu-

(continued...)

What appears to be involved here is an effort by petitioners' counsel to divert attention from, and to avoid the consequences of, their own mishandling of this case in the district court. They could and should have filed a petition for leave to intervene. Indeed, in light of the *Brand Name Drugs* decision, their failure to do so is incomprehensible; but it is certainly not reason for this Court to involve itself in a matter that is a non-issue in this case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

May 22, 1998

Respectfully submitted,

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[10] (...continued)
sion. Just none. These people have dealt with each other professionally and at arm's length. . . ." (Tr. at 82). The relevant pages of the hearing transcript are contained in an Appendix to this Brief.

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

PAUL FELZEN, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No.: 95-2279
	)	
	)	
DWAYNE O. ANDREAS, et al.,	)	
	)	
Defendants.	)	

REPORT OF PROCEEDINGS

DATE: July 7, 1997
FAIRNESS HEARING
BEFORE: HAROLD A. BAKER
Judge Presiding

APPEARANCES:

For the Plaintiff: (NOTE APPEARANCES ON PAGE 2)

For the Defendants: (NOTE APPEARANCES ON PAGE 2)

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significance of the largest corporate fiasco in recent memory with, according to their own experts, Mr. Miller, 250 million in losses to the company wrapped up.

Eight million, Your Honor, means this. Lawyers get money. I don't believe I am misstating that, Your Honor. Because under the terms of the settlement, which is what I am focusing on for a moment, here is what was provided. There will be an eight million dollar pot, but half of it plus interest is agreed to go to the lawyers. Now they have asked for less in their fee petition, but the agreement itself talks about half of the eight million dollars being set aside for the plaintiffs' lawyers.

Which, Your Honor, when we spoke of collusion earlier I realize that's an ugly word and I realize that sounds very pejorative. I make no pejorative aspersions. I don't know what happened in the settlement process. I don't mean to say that I did.

But I can tell your honor that what we cited to the court and the cases says the following. Where there is a cash settlement and a large percentage of the cash is earmarked for lawyers, that by itself raises an inference of collusion.

In fact, their opening commentator, Mr. Coffee says as much in some of his law review work. Now as I say, I wasn't there. I don't know. But where you see a

of cumulative voting was Joseph Medell, the publisher of the "Chicago Tribune," and had Mr. Joseph Medell been alive today, I would have had his affidavit saying he would like to see that cumulative voting be part of the bylaws of Archer Daniels, as part of the governance.

I brought along a book out of my library to show you that cumulative voting isn't just up in Mars with the Pathfinder. A book entitled, "Cumulative Voting for Directors," written by Charles M. Williams, published by the Harvard Business School, it's 200 pages talking about cumulative voting for directors. And to say that in part of their negotiations this shouting and all of this didn't take into the fact cumulative voting, I fail to see that they should receive the severance, the compensation that they are asking for. And actually what I believe the basis is for my discussion, my objection on the fees paid. Thank you.

THE COURT: All right. The court's ready to rule. Having heard the remarks of the proponents of the settlement and the remarks of those in opposition, the court concludes that the settlement, which is before the court is fair, reasonable, and adequate. The court considers the strength of the plaintiffs' claims in the case as balanced against what was obtained in the settlement.

The case the plaintiffs had was not, as one of my colleagues described, "another case as a dead bang winner." Far from it. There were serious questions raised in the motion to dismiss, and I tried to look back through the record to see what discovery wasn't afforded and I think that pool of documents was available, and I can remember discussions with counsel in this case and in the other civil ADM cases that were pending about the availability of the document pool that had been created by Judges, Shadur, Mihm, and I don't know about the Judge in California participating in that, but I believe all of that information was available to the plaintiffs in the case.

So that the record really is slightly misleading as far as discovery is concerned because the plaintiffs did have all of that information available to them.

In addition, the parties, as you see from the docket, got to the point where they were squabbling about compelling discovery and having a hearing on the motion to dismiss, and the defendants kept asking to advance the hearing on the motion to dismiss, and then they began negotiations in the case and the court abstained from hearing or ruling on the motion at the request of the parties so that they could talk to each other.

Well, because lawyers talk to each other doesn't mean that the lawyers are in collusion. Far from it. Of

course, quite obviously they have to communicate and talk if they are going to find some alternative means of settling their disputes other than going to judgment in a court of law.

The defendants' ability to pay. There is a ten million dollar cap on the insurance. Mr. Hansen suggests that the directors had deep pockets. I have been in the legal profession and the litigation end of it for over forty years, I am sorry to say, and I wonder if he has ever tried to pursue a suit for transferring assets in fraud of creditors. That needs a good deal of luck.

And to assume that those directors are holding all of their assets, I think is an unwarranted assumption, so that the ten million dollars is a realistic sum to think was available; at least it was readily available—obviously available.

The complexity, length, and expense of further litigation also has to be considered. This case would have gone on for years. I wouldn't have had to suffer through it, being a senior judge somebody else could have taken it over, by my guess would be five years of further litigation.

The amount of opposition to the settlement. That's been commented upon by the proponents of the settlement. While the objections I am sure are heartfelt

and sincere, they really represent a very very small percentage of the shareholders of the corporation. The [sic] Not that the objections aren't to be discounted just because they are small—from a small number, relatively small number of shareholders, but still the overwhelming reaction to the proposed settlement has been acceptance.

I had no idea Edward Dessen was going to appear. I have known him for years. He is a businessman. He owns property. He is a very outspoken person, and, true, with faint praise, he approved the settlement. He may be reflective of the way a large percentage of shareholders feel. Well, it's a start. It's a beginning.

I find no basis for claims of collusion. Just none. These people have dealt with each other professionally and at arm's length as far as the progress of the case has been concerned.

Certainly competent counsel with experience has expressed support for the settlement. I have to respect that. And I have already spoken a little bit about the stage of the proceedings and the amount of discovery. The case has goon on for two years. A great deal—a substantial portion of which has been devoted to attempting to finding an alternative to the settlement of the dispute.

And, the document pool that was created through Judge Mihm, and I have blocked his name, Milt Shadur was

available to the parties of the plaintiff.

I rely on what Professor Coffee has said and what Alan Miller, the statements made by Miller in support. I respect them as experts. As Professor Coffee observed, it's a state of the art far from perfect, far from being ideal, but still represents a great step forward in corporate governance.

So, in conclusion, I find that the settlement is fair, reasonable, and adequate and I will proceed to hearing this afternoon at 1:30 on the question of fees and allocation of the funds that are sought there.